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RECORD AND BRIEFS

In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF SUBMITTED BY NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC. IN RESPONSE TO BRIEF OF THE UNITED STATES

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1. THIS CASE IS NOT A RE-RUN OF *CHRISTIE I*.

1. The United States has joined the court of appeals in abandoning the saving construction given PASPA in *Christie I*. Absent this Court's intervention, the result will be the whipsawing of New Jersey and the evisceration of the anti-commandeering doctrine.

In the first round of litigation, petitioners argued that "to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as 'authorizing' that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it." *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013). Writing for the court of appeals, Judge Fuentes rejected this argument, reasoning that the "attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization." *Id.* at 233. He explained that repeal and authorization are different because the "right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.* at 232. The distinction between repeal and authorization was explicitly designed to save PASPA's constitutionality. *Id.* at 233.

When petitioners sought certiorari, the United States embraced this saving construction:

> * * * PASPA does not obligate States to enact any law or to implement or administer

> any federal regulatory requirement. Indeed, PASPA does not require States to do anything. * * * PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.

U.S. Brief in Opposition, *Christie I*, at 11.

This time round, with Judge Fuentes dissenting, the court of appeals chose instead "to excise that discussion from our prior opinion as unnecessary dicta," Pet. Appx. A at 23a, a determination akin to excising Chief Justice Roberts' distinction between a tax and a command as dicta. *See Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2601 (2012).

The United States similarly attempts to excise its prior statements to this Court, claiming that it didn't mean to distinguish between a repeal and an authorization, U.S. Brief at 15, and insisting that a partial repeal "is equivalent to" an authorization. *Id.* at 17. That is precisely the "equivalence" that was deemed "false" when urged by the petitioners in round one. Indeed, the United States contends that "virtually any other license or authorization could likewise be reframed as a partial repeal conditioned on the satisfaction of specified requirements." U.S. Brief at 17. Under that approach, any repeal of a prohibition could likewise be reframed as a license or authorization of the conduct no longer prohibited. As a result, if the court of appeals

and the United States are correct, the national government has enormous power to prevent States from lifting State law prohibitions on private conduct, thereby requiring States to prohibit conduct that the State has chosen not to prohibit.

The United States continues to concede that New Jersey could "repeal its prohibition on sports gambling altogether." U.S. Brief at 15. But having abandoned the distinction between authorization and repeal – and the underlying jurisprudential premise that the right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people – it fails to offer a limiting principle on the national government's power to block States from removing state law prohibitions.

Could the national government bar New Jersey from lifting state law prohibitions on sports gambling in only two of its twenty-one counties, leaving the state law prohibition in place in the rest? Could it bar New Jersey from lifting state law prohibitions on sports gambling by competent adults, leaving in place state law prohibitions on sports gambling by children and the incompetent?

Could the national government bar States from rescinding state minimum wage laws in economically distressed localities? Could it bar States from amending state firearm laws to permit more people to carry concealed weapons?

The best that the United States can do is to echo the Leagues in proposing a limiting principle: "common sense." U.S. Brief at 15. But if common sense were a sufficiently sturdy tool with which to constrain the power of the national government, there would be no need for the various doctrines of federalism developed by this Court over the centuries. *Cf. Sebelius*, 132 S. Ct. at 2648 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.) (rejecting an argument of the United States because "were it to be a premise for the exercise of national power, it would have no principled limits.").

"If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). As the United States previously recognized in urging this Court to deny review in *Christie I*, this is true whether the State chooses to remove a state law penalty "in whole or in part." The repudiation of this principle by the United States underscores the need for certiorari.[1]

2. The 2012 Act at issue in *Christie I* and the 2014 Act at issue in this case are totally different. The 2012 Act and its implementing regulations established

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[1] To the extent the United States contends that the interpretation of PASPA is no longer at issue here, it is wrong. "[T]here can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 56 (2006).

a full-throated state licensing and regulatory scheme. The 2014 Act removes all such regulation, leaving the relevant State's regulatory agencies with no authority to regulate sports gambling at particular locations. *See* Petition in 16-476 at 5-6, 9-11.

Moreover, the lifting of the prohibition of sports gambling is not limited to licensed gambling venues. Instead, sports gambling is not prohibited at particular locations, including the racecourses of former racetracks in New Jersey. There are two former racetracks in New Jersey – Garden State Park and Atlantic City Racecourse. Neither of these former racetracks holds a gambling license. Indeed, the former Garden State Park racecourse is currently the site of a privately owned shopping mall whose stores are not state-licensed gambling venues. Yet under the 2014 Act, sports gambling is not prohibited there. And if Monmouth Park were to cease operation as a racetrack and give up its license, sports betting would not be prohibited there either.

Under the 2014 Act, at each of these locations, a person could engage in sports betting as freely as he could wear a hat, sing a song, write a poem, or hug his child – or any of the myriad activities that one can do by virtue of the "right to do that which is not prohibited," a right that "derives not from the authority of the state but from the inherent rights of the people." *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013).

II. THIS CASE IS NOT AN ORDINARY PREEMPTION CASE.

1. The United States now joins the ranks of those who have failed to identify a single Act of Congress under the Commerce Clause (other than PASPA itself) that purports to preempt state law except as an adjunct to direct federal regulation or deregulation. *See* U.S. Brief at 12 n.5 (listing statutes, none of which is based on the Commerce Clause and purports to preempt state law except as an adjunct to direct federal regulation or deregulation); *id.* at 19 & n.6 (same).

The United States points to a number of federal laws protecting against various forms of discrimination by the States. *Id.* But PASPA is not an anti-discrimination statute; it does not bar States from treating betting on basketball differently than betting on football. And even if Congress *had* passed a statute prohibiting the States from treating betting on basketball differently than betting on football, and even if New Jersey *had* lifted its laws against betting on basketball but not on football, the appropriate judicial remedy would *not* be to require New Jersey to prohibit betting on basketball; it would be to block New Jersey from prohibiting betting on football – just as the appropriate judicial remedy for imposition of an unlawfully discriminatory tax is a refund of tax paid by the harmed party, not an order to tax the benefited party. As Justice Brandeis explained long ago, "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines Nat.*

Bank v. *Bennett*, 284 U.S. 239, 247 (1931). But the proper judicial remedy is "refund of the excess of taxes exacted from them." *Id.*

Tellingly, the only case that the United States cites for the proposition that a State can be required to enforce a repealed law is *Riley* v. *Kennedy*, 553 U.S. 406 (2008). *Riley* arose under section 5 of the Voting Rights Act – "a drastic departure from basic principles of federalism," upheld as a means of enforcing the 15th Amendment precisely because "exceptional conditions can justify legislative measures not otherwise appropriate." *Shelby Cty., Ala.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013) (internal quotation marks and citation omitted). *Riley* itself did not compel the enforcement of a repealed law, and the dissent in *Riley* acknowledged that requiring a State to administer a law it has repealed is offensive to state sovereignty, but observed that the Voting Rights Act, "by its nature, intrudes on state sovereignty." *Riley*, 553 U.S. at 436 (Stevens, J., dissenting) (internal quotation marks and citation omitted). Intrusions on state sovereignty can be imposed under the Reconstruction Amendments that could not be imposed under the Commerce Clause. *Compare, e.g.*, *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) *with Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

2. The United States never comes to grips with the meaning of the injunction issued in this case. The district court injunction, affirmed by the court of appeals, enjoined the State Defendants from "giving operation or effect to the 2014 [Act]." Pet. Appx. D at

113a. The 2014 Act repealed prior state law prohibitions on sports gambling. If the State Defendants cannot give effect to that repeal, then they must continue to treat the repealed law as if it were still in effect. Thus, despite the assertions of the United States to the contrary, *see* U.S. Brief at 14, PASPA, as construed by the court of appeals, *does* require New Jersey in its sovereign capacity to regulate its own citizens. In particular, if Monmouth Park were to begin to offer sports betting, it would find itself in violation of *state* law that the state legislature repealed, and subject to prosecution in *state* court by *state* executive officials, who themselves would risk being held in contempt by a *federal* court if they failed to bring that *state* law prosecution in *state* court.

III. THE PROHIBITION OF PRIVATE SPORTS GAMBLING "PURSUANT TO THE LAW OR COMPACT OF A GOVERNMENTAL ENTITY" IS NOT INDEPENDENT OF THE PROHIBITION OF A "GOVERNMENTAL ENTITY" LICENSING OR AUTHORIZING SPORTS GAMBLING "BY LAW OR COMPACT."

PASPA makes it unlawful for "(1) a governmental entity to * * * license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity," sports gambling. Contrary to the assertion of the United States, U.S. Brief at 22, the secondary prohibition on private conduct is both textually and

functionally dependent on the primary prohibition on state conduct.

Textually, the secondary prohibition on a private actor engaging in sports gambling "pursuant to the law or compact of a governmental entity" is plainly a reference to the "license" or "authoriz[ation] by law or compact" that the primary prohibition in that same sentence tells a "governmental entity" not to provide. The secondary prohibition is no more independent of the primary prohibition than section 5 of the Voting Rights Act is independent of the coverage formula of section 4: in both statutes, the earlier language establishes the scope of the later prohibition.

Functionally, if there is no primary violation by a "governmental entity" – either because the governmental entity has not violated the statutory prohibition as properly construed or because the statutory prohibition is unconstitutional – there is no predicate for a secondary violation by a private person acting "pursuant to" the forbidden "law or compact of a governmental entity." If New Jersey's 2014 repeal of its prohibition on sports betting at particular locations is valid, then the legal status under New Jersey law of betting on sports at Monmouth Park is the same as the legal status under New Jersey law of wearing a hat, singing a song, writing a poem, or hugging one's child – and only in a totalitarian state would it be said that these activities are done "pursuant to the law or compact of a governmental entity."

IV. THIS CASE IS IMPORTANT AND PRESENTS AN ISSUE DIVIDING LOWER COURTS.

1. Contrary to the assertion by the United States, *see* U.S. Brief at 22, numerous states have enacted statutes that are put at risk by the court of appeals decision. *See* NJTHA Petition at 14 & n.4. (noting nine states that have laws authorizing daily fantasy wagering on athletic performances and twenty-four other states in which such legislation has been introduced). PASPA by its terms reaches gambling on the performances of athletes.

2. The United States dismisses the significance of three decisions by state courts of last resort as "simply quot[ing] *New York* and *Printz*." U.S. Brief at 22 n.9. But those decisions did more than that; they relied on *New York* and *Printz* to uphold state medical marijuana laws that partially lifted prior state laws prohibiting marijuana.

The highest courts of Michigan and Arizona held that the federal Controlled Substances Act does not preempt state medical marijuana laws because Congress lacks the constitutional authority to require states to prohibit marijuana. *Ter Beek* v. *City of Wyoming*, 846 N.W.2d 531, 537-39 (Mich. 2014) (rejecting preemption of state medical marijuana law that provides "a limited *state-law* immunity" because the Controlled Substances Act does not, and could not under *Printz* and *New York*, compel the states to prohibit marijuana) (emphasis in original); *Reed-Kaliher* v.

Hoggatt, 347 P.3d 136, 141 (Ariz. 2015) (finding *Ter Beek* "persuasive" in reasoning "that the statute does not prevent federal authorities from enforcing federal law – it merely provides "a limited state-law immunity"). The Supreme Court of Montana held that a state court could not require a defendant to comply with federal law without providing an exception for the use of medical marijuana. It relied on *New York*, *Printz*, and Judge Kozinski's concurrence in *Conant*, and explained that the medical marijuana act "is a valid exercise of Montana's police power under the dual state and federal structure embodied in the United States Constitution." *State* v. *Nelson*, 195 P.3d 826, 834 (Mont. 2008).

If the United States and the court of appeals are correct, all three of these decisions are wrong. As the United States and the court of appeals would have it, Congress can use its power to regulate interstate commerce to prohibit states from partially repealing their criminal laws. But all three of those courts concluded that Congress lacked the constitutional authority to do so.

None of these state medical marijuana laws repealed all state laws prohibiting marijuana. Instead, those laws removed state anti-marijuana laws only for certain individuals with certain diseases that qualified for the exemption, who received designated state identification cards, and who possessed limited quantities of marijuana in limited locations. *See Reed-Kaliher* v. *Hoggatt*, 347 P.3d 136, 139 (Ariz. 2015) (noting that the Arizona medical marijuana law "permits those who

meet statutory conditions to use medical marijuana" and that "marijuana possession and use are otherwise illegal in Arizona" and describing some of those statutory conditions); *State* v. *Nelson*, 195 P.3d 826, 828 (Montana 2008) (noting that under the Montana medical marijuana act, "it is legal for citizens to use medical marijuana in order to treat a variety of 'debilitating medical conditions,' provided they have received written certification from a physician that the potential benefits of medical marijuana use would outweigh the health risks, they are accepted in the Program by [a state agency], and otherwise comply with the requirements of the [act]"); *Ter Beek* v. *City of Wyoming*, 846 N.W.2d 531, 534 n.1 (2014) (noting that the Michigan medical marijuana act "specifies the circumstances under which a person can register with the state as a qualifying medical marijuana patient. Upon satisfaction of these criteria, the state issues a registry identification card to the qualifying patient."). Indeed, the narrow scope of these conditions would count as state "authorization" as understood by the United States and the court of appeals.

Nor is the significance of this case limited to gambling and marijuana. If Congress has the power that the United States and the court of appeals think it has, it can use this legislative technique in a virtually limitless set of circumstances.

The petition should be granted.

Respectfully submitted,

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